

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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R&O CONSTRUCTION COMPANY,  
Plaintiff,

v.

ROX PRO INTERNATIONAL GROUP,  
LTD.; et al.,  
Defendants.

2:09-cv-01749-LRH-LRL

ORDER

Before the court is plaintiff R&O Construction Company's ("R&O") motion to strike the declaration of Nakesha Duncan ("Duncan") submitted in support of defendant Real Stone Source, LLC's ("Real Stone") motion for summary judgment (Doc. #77, Exhibit 1<sup>1</sup>). Doc. #92. Real Stone filed an opposition (Doc. #100) to which R&O replied (Doc. #108).

**I. Facts and Background**

This is a construction defect action. R&O was the general contractor for a Home Depot store in Las Vegas, Nevada. R&O subcontracted the construction of the required stone veneer, manufactured by defendant Rox Pro International Groups, Ltd. ("Rox Pro"), to non-party New Creation Masonry Inc. ("New Creation"). New Creation purchased the stone veneer from defendant

<sup>1</sup> Refers to the court's docket number.

1 Arizona Stone and Architectural Products NV, LLC (“Arizona Stone”). Allegedly, the stone veneer  
2 failed and R&O was forced to make substantial structural repairs to the Home Depot store.

3 On September 3, 2009, R&O filed its initial complaint against defendants Rox Pro; Real  
4 Stone; Arizona Stone; and WD Partners, Inc. (“WD Partners”), the architectural firm which  
5 designed the Home Depot store. Doc. #1. R&O filed a first amended complaint on February 5,  
6 2010 (Doc. #22) and a second amended complaint on June 29, 2010 (Doc. #48). The second  
7 amended complaint alleges ten causes of action: (1) implied warranty of merchantability - Arizona  
8 Stone; (2) implied warranty of fitness for a particular purpose - Arizona Stone; (3) implied warranty  
9 of merchantability - Real Stone; (4) implied warranty of fitness for a particular purpose - Real  
10 Stone; (5) implied warranty of merchantability - Rox Pro; (6) implied warranty of fitness for a  
11 particular purpose - Rox Pro; (7) express warranty - Real Stone and Rox Pro; (8) express warranty -  
12 Arizona Stone, Real Stone, and Rox Pro; (9) negligent misrepresentation - WD Partners and  
13 Real Stone; and (10) breach of contract - WD Partners. Doc. #48.

14 On April 8, 2011, defendant Real Stone filed a motion for summary judgment. Doc. #77. In  
15 support of its motion, Real Stone attached the declaration of Nakesha Duncan. Doc. #77, Exhibit 1.  
16 Thereafter, R&O filed the present motion to strike the declaration for failure to disclose Duncan as  
17 a witness pursuant to Rule 37 of the Federal Rules of Civil Procedure. Doc. #92.

## 18 **II. Discussion**

19 Federal Rule of Civil Procedure 37 states in pertinent part that “if a party fails to provide  
20 information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use  
21 that information or witness to supply evidence on a motion . . . , unless the failure was substantially  
22 justified or is harmless.” FED. R. CIV. P. 37(c)(1). This sanction is “self-executing” and  
23 “automatic.” *Yeti by Molly Ltd. v. Deckers Outdoor Co.*, 259 F.3d 1101, 1106 (9th Cir. 2001).

24 Here, it is undisputed that Nakesha Duncan was not disclosed as a witness in this action in  
25 accordance with Rule 26. Therefore, the court finds that her declaration is properly excludable  
26

1 under Rule 37(c)(1).

2 In opposition, Real Stone argues that the late disclosure of Nakesha Duncan was harmless  
3 because her declaration contains information that is cumulative of other evidence already provided  
4 to the court. *See* Doc. #100. However, the court finds that Duncan's declaration contains additional  
5 non-cumulative statements for which there is no other identified source. Therefore, the court finds  
6 that Real Stone has not made a sufficient showing that the failure to identify Nakesha Duncan was  
7 harmless. *See Yeti by Molly Ltd.*, 259 F.3d at 1107 ("Implicit in Rule 37(c)(1) is that the burden is  
8 on the party facing sanctions to prove harmlessness."). Accordingly, the court shall grant R&O's  
9 motion to strike.

10  
11 IT IS THEREFORE ORDERED that plaintiff's motion to strike (Doc. #92) is GRANTED.  
12 The clerk of court shall STRIKE the declaration of Nakesha Duncan attached as Exhibit 1 to  
13 defendant's motion for summary judgment (Doc. #77).

14 IT IS SO ORDERED.

15 DATED this 12th day of September, 2011.



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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE